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ECCC's Legacy for the Rule of Law in Cambodia

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Workshop
Report

Implementation of the ECCC Legacies for Domestic Legal and Judicial Reform



March 2013
Sunway Hotel, Phnom Penh, Cambodia

Co-organised by: The Cambodian Human Rights Action Committee (CHRAC) and the Bar Association of the Kingdom of Cambodia (BAKC)

Workshop
Report

Implementation of the ECCC Legacies for Domestic Legal and Judicial Reform

Report Edited by: Mr. Oeung Jeudy, Mr. Billy Chia-lung Tai and Mr. Sang Sothun

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FOREWORD BY THE CO-ORGANIZERS



SUON BUNSAK
CHRAC Executive Secretary



BUN HONN
BAKC President

On 12 March 2013, the Cambodian Human Rights Action Committee (CHRAC) and the Bar Association of the Kingdom of Cambodia (BAKC) organized a Workshop on “Implementation of the ECCC Legacies for Domestic Legal and Judicial Reform” at Sunway Hotel, Phnom Penh. The workshop was financially supported by Konrad-Adenauer-Stiftung (KAS)’s Rule of Law Program for Asia based in Singapore.

This workshop was the first follow-up of the high level Conference on “Hybrid Perspectives of the Legacies of the ECCC” that was jointly organized by CHRAC and the Extraordinary Chambers in the Courts of Cambodia (ECCC) on 13-14 September 2012 at Raffles Hotel Le Royal, Phnom Penh. One of the recommendations of this Conference was to further engage with local legal and judicial reform actors so as to further develop concrete strategies and action plan for the implementation of those debated legacies from the ECCC to benefit the domestic legal and judicial reform in Cambodia.

Having experiences in this field, CHRAC realizes that the lawyers who are practicing at the national justice system, among others, are the key catalysts for change and reform of the domestic judiciary. Therefore it approached the Bar Association to co-organize this event that aims to strengthen the understanding of the lawyers in their roles in mainstreaming the best practices applied at the ECCC to their daily work in the domestic judicial and legal system. CHRAC and BAKC are pleased to announce that the objectives were achieved successfully as shown in the lively and active debates during the one-day workshop.

CHRAC and BAKC would like to take this opportunity to express their thanks to all of the participants coming from the Civil Society, the BAKC, national judiciary, foreign diplomat representatives, donors, academic institution, and ECCC for their active participation and contribution during the workshop. The Co-Organizers also would like to express gratitude to all the speakers and the facilitators of the workshop.

Last but not least, the Co-Organizers convey special thanks to the staff members of CHRAC (Mr. Oeung Jeudy, Mr. Hun Seang Hak, Ms. Lach Sreytouch, Mr. Eang Chantha, Mr. Nhean Sam Ath and Mr. Ieng Pich) and BAKC (Mr. Sang Sothun) who have contributed enormous efforts to make this event happen. Particular thanks go to Mr. Andre Dauwalder, the workshop note taker, and to Mr. Oeung Jeudy, Mr. Billy Chia-Lung Tai (CHRAC’s Human Rights Advisor) and Mr. Sang Sothun for editing this report.





WORKSHOP BACKGROUND AND OBJECTIVES

The Extraordinary Chambers in the Courts of Cambodia (ECCC) were created in 2003 to put “senior leaders and those most responsible” for the crimes committed between 1975 and 1979 on trial. In addition to the on-going trials, it will be important to assess the lasting legacy of the ECCC once it ceases its activities. This is an issue that has been addressed by all other international criminal tribunals, such as the International Criminal Tribunal for former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL). To date, the ECCC has not conducted any significant activities to address the issue of its legacy. To this end, CHRAC is aiming at a coordinated approach to bring relevant actors together and to start specific legacy projects. The first major event was a conference on the ECCC’s legacy co-organized by CHRAC and the ECCC in September 2012. In this high-level conference, recommendations were delivered and it is now the time to start implementing these recommendations.

CHRAC is one of the main actors actively involved in the ECCC legacy project as well as having experience with activities around the Khmer Rouge tribunal ever since its inception. Several member organizations within CHRAC’s network have established initial programs related to the ECCC’s legacy. CHRAC has also collaborated with the UN OHCHR in the past and facilitated workshops together.

BAKC is a significant and professional regulatory body in the national justice sector. It has an aim to improve the professional capacity of its members to stay up-to-date with legal development as well as other important issues in Cambodia. It also aims to contribute to the improvement and strengthening of the domestic legal and judicial reform. To this end, the judicial legacies of the ECCC have been an important focus for BAKC to ensure fair trial standards in accordance to the international principles. It is an important tool for the lawyers to learn and share among each other on how they can apply those best practices at the domestic level.

LEGACY OF THE ECCC

Legacy will become a central theme in the next years

as more actors begin asking the legitimate question as to what positive (and potentially negative) impacts the ECCC might have. Legacy is also a broad term and needs clarification as to its meaning. CHRAC’s interpretation is aligned to the understanding of OHCHR. Legacy is defined by OHCHR as “a hybrid court’s lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity. The aim of this is for its impact to continue even after the work of the hybrid court is complete.”¹ OHCHR identifies four potential legacy initiatives:

- 1) Promoting a Culture of Rule of Law,
- 2) Human Resources and Professional Development,
- 3) Physical Infrastructure or Materials as a Legacy, and
- 4) Law Reform as a Legacy.²

The impact on the domestic legal and judicial reform is an important aspect of the ECCC’s lasting legacy. The NGOs and their Civil Party Lawyers, which have gained extensive experiences from the work with the civil parties, should use their expertise to strengthen legal aid and legal assistance in Cambodian domestic courts. A domestic legal aid scheme is still to be developed. Realizing this significance, CHRAC and BAKC therefore have focused on *law reform as a legacy* in the workshop held on 12 March 2013.

OBJECTIVES OF THE WORKSHOP

The objectives of having a workshop on the ECCC’s legacy in Cambodia are the following:

- 1) To initiate national consultations on legacy aspects, in particular on how to implement the lessons learnt to the national system;
- 2) To discuss what legacy aspects can be implemented in the legal & judicial reform sector;
- 3) To discuss and streamline the role of civil society organizations and the Bar Association in the process of legal & judicial reform;
- 4) To initiate the development of a coordinated action plan for civil society organizations for legal & judicial reform activities.

¹ Rule-Of-Law Tools for Post-Conflict States, Maximizing the Legacy of Hybrid Courts, OHCHR 2008, pp.4-5; available at <http://www.ohchr.org>.
² Ibid, pp. 17 et seq.



WORKSHOP PROCEEDINGS



Left to right: Mr. Marc Spitzkatz, Mr. Thun Saray, Mr. Bun Honn & Mr. Suon Bunsak at the opening session (Photo by: Chantha)

I. WELCOME AND OPENING REMARKS



Mr. Thun Saray, *CHRAAC Representative/President of the Cambodian Human Rights and Development Association (ADHOC)*

WELCOME REMARKS

Mr. Thun Saray opened by welcoming everyone to the workshop entitled “Implementation of the ECCC Legacies for Domestic Legal and Judicial Reform”. He made some brief comments about the many aspects of ECCC legacy, including civil party participation and the provision of psychological support to victims at the ECCC, both of which are important. The ECCC has produced a lot of jurisprudences pertaining to the fair trials rights, documentation and archives, and enormous outreach activities conducted by both the court itself and the NGOs. The civil party participation at the ECCC is the first mechanism applied at the internationalized or hybrid tribunals. He said therefore having the existence of the ECCC being a court inside the country where crimes were committed is essential for the government, particularly the Legal and Judicial Reform Council, and other interested ministry, donors, CSOs and the Bar Association to look into specific best practices which can contribute the reform of the local legal system and judiciary. Mr. Thun Saray placed particular importance on the need to reform the current legal system and judiciary as recognized by the Cambodian government and other development partners to ensure the proper administration of justice, and a well-functioning court system that build trust

and confidence among the Cambodians and outsiders. Mr. Thun Saray said that this workshop is one part of a wider process. To fully realize the implementation of ECCC legacies in practice, it will be necessary to have several follow up workshops. The issues discussed at these workshops are important, as the Cambodian people have been suffering injustices for a long time, which has had an adverse effect on their livelihoods and wellbeing. Successfully implementing ECCC legacies will require cooperation and collaboration with several different stakeholders, both groups and individuals, in order to realize the objectives of these workshops and to provide fair justice to the Cambodian people. In his last remark, he stressed the importance that the lawyers, either defense lawyers or civil party lawyers, at the ECCC play an important role in sharing and transferring their knowledge among their colleagues on the best practice. In the end, he thanked all the participants and particular KAS for providing support and he suggested that the result of the workshop would be a basis for lawyers, CSOs and others to learn from and initiating concrete action plans and strategies for transferring the ECCC’s best practices and legacies for the domestic reform, especially to ensure fair trials and social justice.



KEYNOTE

Mr. Marc Spitzkatz, *Director of the Rule of Law Program Asia, Konrad-Adenauer-Stiftung, Singapore*

Mr. Spitzkatz said that today's workshop would be one of a series of workshops. This particular one is focused on the ECCC legacy for the reform of Cambodia's legal and judicial system. Mr. Spitzkatz added that he hoped the word "legacy" here was not taken too literally and that the ECCC will be with us until their work is complete.

The last conference on this topic occurred in September 2012 and this workshop is a follow up to that conference. Today, greater focus will be placed on the perspective of civil society organizations and the practitioners and members of the bar. Practitioners will play a very important role in the continued implementation of the rule of law in Cambodia.

Mr. Spitzkatz stated that KAS commissioned a study on ECCC legacy that is designed to benefit both Cambodia and other countries with a similar transition of justice. We can learn from the German experience – the Nuremberg trials sent a clear signal that there is no impunity for governments who commit heinous crimes, and that such trials should result in an effort to reestablish the rule of law after a period of violence. One of the observations from the German experience was that the rule of law was more highly appreciated

after a period of violence. Of course, the historical background in Cambodia is different to that of Germany; however we can still use the experience at the ECCC to promote and encourage a positive effect on the development of the Cambodian legal system, which was destroyed during the Khmer Rouge regime, and promote the development of the rule of law. It is hoped that the legacies of the ECCC can provide a positive input into the development and can result in the establishment of solid legal frameworks and procedural rules for the domestic system.

Mr. Spitzkatz also provided some background to Konrad-Adenauer-Stiftung (KAS), which funded the workshop. KAS has 80 offices, and its objective to promote democracy across the world. One aspect of that is the promotion of the rule of law. The office in Singapore focuses on regional Asian rule of law aspects, and it is hoped that the Cambodian experience can help other countries in a similar period of transition.

OPENING REMARKS

Mr. Bun Honn, *President of the Bar Association of the Kingdom of Cambodia*

Mr. Bun Honn stated that it was a great honor to be here today and to take part in the workshop. CHRAC had previously organized a similar workshop in September 2012, which provided recommendations for the development of national and international



Workshop participants & the French chargé d'Affaire Dominique Mars (on the right far end)

criminal law in Cambodia. Many perspectives were put forward at that workshop.

Mr. Bun Honn commented on the meaning of “legacy” within the context of the ECCC, as defined by UNOHCHR in 2008. The term “legacy” has been defined as things left over from the hybrid tribunal in order to promote the rule of law, provide jurisprudence to remove the culture of impunity and to improve the capacity of the domestic courts. This legacy extends to the promotion of certain principles, such as the right to a fair trial, the implementation of norms and standards governing the regulation of evidence, the participation of civil parties, better practices relating to case management and the compilation of records and documents, the provision of support to victims and greater access to justice for women. It is hoped that the implementation of ECCC legacies will provide a vital input into the process of legal and judicial reform in Cambodia, and ultimately build greater trust in the domestic court process.

Mr. Bun Honn mentioned the quote of Royal Government of Cambodia that “Reform is a do or die issue for Cambodia”. The legacy of the ECCC should be used in a way to provide practical recommendations to the Royal Government of Cambodia to further the process of legal and judicial reform, and to develop a trusted law and court procedure. Mr. Bun Honn highlighted some of the possible outcomes flowing from the implementation of ECCC legacies that might fit with the Cambodia government’s legal and judicial

reform strategies, including:

- 1) the protection of rights and individual freedoms, such as the right to a fair trial, the right to reparations, and greater access justice for women;
- 2) modernization of the legal framework;
- 3) providing people with access to court information and laws;
- 4) the provision of quality legal proceedings and other related services;
- 5) strengthening the judicial services including the judiciary and prosecution which help improve the court monitoring;
- 6) the introduction of alternative dispute resolutions (no legacy applied)
- 7) the transfer of knowledge and expertise between judges, lawyers, experts, psychologists,

Mr. Bun Honn concluded by iterating his hope that today’s workshop will provide a variety of different perspectives and concepts to promote legal and judicial reform of Cambodia, and that it will lead to competitive studies, outcomes and recommendations to be implemented into the domestic court system. It is hoped that the ECCC will prove to be a great contribution to social development, legal and judicial reform, and lead to a greater transfer of legal knowledge from the ECCC to outside groups and individuals.



II. PANEL DISCUSSION I: AN OVERVIEW OF ECCC'S LEGACIES

This session was facilitated by **Mr. Pich Ang**, National Lead Co-Lawyer at the ECCC



Left to right: Ms. Jenny Holligan, Dr. David Boyle, Mr. Pich Ang and Mr. Simon Meseinberg (Photo by: Chantha)

Presentation of ECCC Legacies Conference's Results (key recommendations) pertaining legal and judicial aspects

Mr. Simon Meseinberg, *CIM Advisor at the ECCC Trial Chamber*



Mr. Meseinberg's presentation provided a summary of the recommendations made by national and international experts at the September conference. He also provided some comment on the meaning of "legacy" within the context of the ECCC.

In Khmer, the word "legacy" is directly translated to mean "heritage". This is a good translation, as it suggests that we are passing something on to future generations. Essentially, we want to inherit a positive legacy that can be handed over and used for the benefit of the Cambodian legal and judicial system.

The OHCHR provides the following definition of the ECCC "legacy": *"a hybrid tribunal's lasting impact on bolstering the rule of law in a particular society... the aim is for this to continue even after the work of the court is complete."* This involves not only fighting impunity for the most heinous of crimes, but also helping the development of legal and judicial reform in the country. A similar definition was provided by H.E. SOK An, who remarked that "the Extraordinary Chambers in the Courts of Cambodia as a national

court are in a unique position to leave a lasting legacy, in particular for the development of the rule of law in the domestic judiciary”.

Another important aspect of legacy is the interaction between the ECCC and outside stakeholders. The result should not simply be a static assessment of the work of the ECCC, but must also involve an interaction between key stakeholders. For example, lawyers in the domestic courts may ask members of the ECCC whether they have specific experience or jurisprudence in certain aspects of the law (such as precedents, decisions or expertise). That knowledge can then be transferred from the ECCC to the domestic legal system.

Mr. Meseinberg then turned to the question of how the ECCC can contribute to the development of the rule of law in Cambodia, and provided a summary of the recommendations that came out of the September 2012 conference.

The first recommendation was “jurisprudential guidance”. Cambodian criminal courts should be guided by the best practices of the ECCC, in particular those ensuring independence and impartiality, fair trial rights and standards for the admission and evaluation of evidence. In relation to arrest, detention and bail, international standards as set out in the ICCPR should be adhered to. The ECCC should also publish a selection of interlocutory decisions and judgments that address the above-mentioned principles and distribute them to domestic criminal courts, ministries and law faculties.

The second recommendation was “trial monitoring”. The idea here is to encourage ECCC officials to train national practitioners in fair trial rights and to coordinate such training with the Royal Academy of Judges and the Bar Association. National staff working within the ECCC should be employed within the domestic judiciary after the ECCC proceedings have finalized, and use the knowledge gained to further improve the domestic system. It is important that the ECCC’s decisions are disseminated to encourage academic publication of ECCC jurisprudence and a

greater degree of law reporting.

The third recommendation was the “use of forensic experts”. There is a shortage of forensic experts in Cambodia, which is unfortunate given the vital role played by such experts in criminal trials. More training and incentives must be offered by various Cambodian universities and other state institutions.

The final recommendation was “greater access to justice for women”. This includes representation of female victims, and greater promotion of rights of females arrested and detained. Guidelines should be prepared with respect to how female victims can be adequately and effectively represented, and how legal representation can be improved at the domestic level.

ECCC’s Legacy for the Rule of Law in Cambodia

Ms. Jenny Holligan, *Researcher with KAS-Singapore University of Management Project*

Ms. Holligan’s research is focused on how the ECCC can help strengthen the rule of law and domestic practices in Cambodia. Her research also involves assessing the related judicial transitional justice initiatives as well as the non-judicial initiatives, including reconciliation and institutional capacity-building.

Ms. Holligan remarked that it is important to examine today’s legal issues in order to assess how to strengthen the rule of law. She provided a brief overview of the history of rule of law issues in Cambodia. The Cambodian legal system suffered heavy setbacks as a result of the Communist Party of Kampuchea’s (CPK) policies during the 1975-1979 periods. The CPK abolished virtually all institutions existing under Cambodia’s previous governmental regimes, including the courts. CPK policies also targeted certain classes of people ranging from Cham Muslims and Khmer Krom, to former governmental employees and intellectuals. After 1979, Cambodia was left with just 10% of its teachers and lawyers.

Although the Cambodian Constitution guarantees the independence of the judiciary, concerns have been raised as to lingering systemic weaknesses within the judicial branch of government. The UN



Special Rapporteur on the Situation of Human Rights in Cambodia commented in June 2010 that: “a combination of a lack of adequate resources, organizational and institutional shortcomings, a lack of full awareness of the relevant human rights standards, and external interference, financial or otherwise, in the work of the judiciary, has resulted in an institution that does not command the confidence of the people from many walks of life.”

Ms. Holligan then addressed the topic of the ECCC’s purpose, features and jurisprudence. The problems facing the Cambodian legal system were well known when the ECCC was created and were among the reasons for its establishment. The ECCC was hailed as a model court for the domestic legal system that could bolster the rule of law in Cambodia and build the national judiciary’s capacity. However, given that the ECCC has only completed one of the four cases brought before it, the measure of its contribution to justice and the domestic judiciary remains uncertain.

Even though it may be premature to accurately determine what (if any) impact the ECCC will have on the rule of law in Cambodia, we can examine the features of the ECCC and the legacy projects in operation designed to strengthen the capacity of domestic institutions.

The purpose of the ECCC is to hold accountable the Khmer Rouge regime’s senior leaders and those considered to be most responsible for the crimes committed. In doing so, it will bring an end to the impunity for the Khmer Rouge atrocities and deliver justice to victims of the regime. This has important implications in the wider Cambodian context, as the ECCC legacy will enable it to address shortcomings in its own domestic legal system, strengthen its domestic judicial capacity and bolster the rule of law.

Ms. Holligan also outlined some features of the ECCC, including:

- 1) the ECCC proceedings are conducted in a transparent public manner and are open to scrutiny by the press and civil society;
- 2) it is a hybrid court requiring participation by both international and national legal professionals, and creates a forum for

- 3) exchanging practices, skills and knowledge; existing criminal procedure applies, and if that procedure does not deal with a particular matter, guidance is sought in rules established at the international level; and
- 4) it is the first internationalized tribunal to allow for such comprehensive participation by victims. Victims participate alongside witnesses and play a large part in the proceedings;
- 5) it has the largest gallery of any internationalized tribunal and has been well attended by the Cambodian people (111,543 people visited the ECCC from 16 February 2009 to 31 December 2011).

Ms. Holligan suggested that seeing the accused in the dock may work to reinforce the presence of the rule of law in Cambodia after 30 years of impunity.

There have, however, been a number of criticisms directed towards the ECCC, and any analysis of its purpose and effect would be incomplete without identifying such criticisms. These include:

- 1) the ECCC is under considerable pressure to ensure due process and administer justice efficiently given the advanced age and poor health of the defendants in Case 002;
- 2) the ECCC is plagued by funding difficulties. The national side has been unpaid since November 2012 and the translators have recently gone on strike; and
- 3) political interference in Cases 003 and 004 led to the resignations of two International Co-Investigating Judges.

There are several legacy projects undertaken by the ECCC, civil society and NGOs that is facilitating a direct link between the ECCC and the domestic legal system, and helping to strengthen domestic capacity and bolster the rule of law. Such legacy projects include:

- a) UNOHCHR Cambodia is working with lawyers, prosecutors and judges at the ECCC, as well as key domestic actors, to implement legacy programs that focus on the exchange of knowledge (for example, by hosting judicial roundtables and training on fair trial rights),

facilitating ongoing dialogue, discussion and debate about the role of the ECCC in the Cambodian legal sector and facilitating the introduction of tools and curricula to ensure greater dissemination of the ECCC's jurisprudence to legal professionals and academics.

- b) Departments within the ECCC have adopted specific training programs to ensure the legacy of the ECCC is implemented, including collaboration between the Defense Support Section, the Cambodian Bar Association and the UNOHCHR to deliver fair trial rights training, training on court procedure, legal ethics, advocacy and drafting run by Lead Co-Lawyers and a legal workshop series run by OCP.
- c) Various initiatives targeting law students, including ECCC internships, DC-Cam trainings and the use of ECCC lawyers as guest lecturers and moot court team coaches at the Royal University of Law and Economics.
- d) The archiving of ECCC decisions and Khmer Rouge documents and photographs, and the inclusion of the Khmer Rouge history in the school curriculum.
- e) The establishment of *the Sleuk Rith Institute* by DC-Cam to serve as a permanent document center.
- f) The Khmer Institute of Democracy training citizen advisors on the dissemination of information on ECCC procedures, fair trial principles and to increase awareness of the Khmer Rouge history among village communities.

The Contribution of ECCC Proceedings to Cambodian Law

Dr. David Boyle, *researcher and former legal officer at the ECCC's Office of Co-Investigating Judges*

Dr. Boyle's presentation was focused on a report being prepared for the Royal University of Law and Economics that will address how the ECCC proceedings will benefit Cambodian domestic law. His talk was directed towards the way in which the report was prepared, rather than its actual content.

When Dr. Boyle left the court in 2010, he was asked to participate in the creation of a database of Cambodian legal instruments. This also involved the preparation of a report on Cambodian criminal law and procedure. The first part of report outlined the current state of law and procedure in Cambodia. The second part of the report provides guidance on the interpretation of Cambodian law and procedure. The report was essentially a thematic presentation on ECCC jurisprudence that deals with some of the most important issues of law and procedure. The first draft was made public in November and disseminated widely. Dr. Boyle is currently making the final changes and aims to complete the report in April.

An important question to ask is to what extent the ECCC case law is transposable to Cambodian law. That is, what is its relevance? Although the Court has made only a few major decisions, a myriad of procedural decisions have been made which directly interpret provisions that exist under Cambodian law. There are two unique aspects of the ECCC – it was established under Cambodian law (thus applies Cambodian procedure) and it is able to apply international standards. Dr. Boyle often found that, when faced with the need to interpret Cambodian law, the court would look to French law. The Court was guided by international case law regarding standards to be applied, which was then used to interpret identical provisions under Cambodian law. In fact, international standards proved a very useful tool in providing interpretation under domestic law. By way of example, in many provisions of Cambodian law, it is stated that a "reasoned decision" must be given, but no definition of "reasoned decision" is provided under domestic law. There exists a considerable amount of ECCC case law that addresses the sort of content that must be considered by the ECCC in order for it to provide a reasoned decision. This is an example of the sort of contribution the ECCC can make to assist Cambodian judges in writing decisions under domestic law.

Dr. Boyle then addressed the question of how the lessons learnt from the ECCC can be transferred to the national system. Fortunately, much of the knowledge base actually derives from within the ECCC system, and therefore the impetus for providing a transfer



of knowledge must come from the officers within the court. Another important aspect was that this particular project was run by a Cambodian academic institution, with the benefit of a flow-on of information to students.

With respect to the presentation of the report itself, it was important that the report be a stand-alone document and therefore contains all information necessary without the need to consult other sources. For example, the report contained all relevant provisions of Cambodian law and case extracts. Further, the report was written in English, which will allow for wider dissemination. One of the disadvantages of the report is that it is very long and can be daunting for a Cambodian legal professional. However, it is not intended to be read from end to end. It is thematic and thus the reader can approach each topic individually.

QUESTION AND ANSWER SESSION

A number of questions were put forward by members of the audience which included the following:

1. How do we make judges and prosecutors confront the political interference and show the spirit of independence? Having knowledge alone is sometimes useless due to lack of courage to deal with such interference.
2. Regarding identification of lessons learnt,

who will play a leadership role in this issue of legacy? How will the ECCC as an institution engage in legacy activities and is it serious about such legacy?

3. How are the concepts such as fair trial etc. to be accepted by national judicial officers?
4. Regarding the seriousness of the ECCC in legacy activities – how much has the ECCC been engaged in terms of implementing the recommendations from the September conference? Databases are important, but equally important is that the actors (such as judges and lawyers) are heavily involved. How much have they been involved in implementing the recommendations?

Comments by Mr. Simon Meseinberg

The first and third questions are interlinked. There is concern about the independence of the domestic court system, and question is how can we improve it? The lesson from the ECCC is to go by the rule of law. So, it is up to the lawyers to make such an argument in the domestic court. We need to look at how the ECCC deals with situations where the lawyers challenged the independence of judges. The claim must be made by the lawyers and evidence presented.

Regarding the third question, the starting point is for lawyers to raise certain questions and to mention



Workshop Participants OHCHR - Cambodia Acting Representative Mr. James Heenan (on the left) (Photo by: Chantha)

jurisprudence that is applicable to a certain question and then see how a judge may respond to that.

Regarding the second question, there is no ownership of legacy as such, but rather there are several players responsible for promoting legacy – the ECCC obviously an important player, but not the sole actor of legacy. Is the ECCC serious about legacy? Yes, otherwise they would not have organized the conference in September, and the conference shows there is a continued interest in legacy. Changes will not come immediately, but there will be some impact in the future for sure.

Response by Dr. David Boyle

Dr. Boyle agreed with the role lawyers can play in addressing independence issues. Also, reports such as the one being prepared and the annotated criminal code should be used as a tool readily available to lawyers to ensure that debate in the courtroom is based on legal reasoning. If the domestic courts starts using legal jurisprudence as the basis for its own procedure and reasoning, it will lead to less scope of personal and political interferences.

He could not speak for the ECCC about how serious it is about legacy. But from personal experience, Dr. Boyle proposed a project to the court to set up a comprehensive database of all the ECCC's jurisprudence that was readily available. No feedback on this was

provided by the ECCC, and it was the university that ended up assisting with the project.

Response by Ms. Jennifer Holligan

Ms. Holligan believes that the ECCC is serious about legacy. This can be seen through Court-supported trainings, collaboration with other institutions and outreach activities. It is also important to bring people to the Court and give them a chance to view the proceedings.

Comments by Mr. Simon Meseinberg

Some recommendations are being worked on by the ECCC. For example, the ECCC has engaged a consultant to focus on implementation of the recommendations. However, it is important to have an interaction from several players and organizations. Those organizations are also responsible to approach ECCC and request training on a particular aspect.

Response by Dr. David Boyle

My own experience was not so positive. Having said that, I don't think there is a question of whether ECCC will leave a legacy behind – I think it already has a legacy. For example, the inclusion of civil parties means that lawyers now have incredible experience in representing civil parties at court. From my point of view, the ECCC's best contribution to legacy is to just do its work and do it as best as they can.



III. PANEL DISCUSSION II – CURRENT LEGAL AND JUDICIAL REFORM EFFORTS

This session was moderated by **Mr. Sam Sokong**, Civil Party Lawyer and Lawyer of Legal Aid of Cambodia



Left to right: Mr. Sok Sam Oeun, Ms. Catherine Phuong, Mr. Sam Sokong and Mr. Bun Honn (Photo by: Chanthra)

Perspective of legal professional on the current domestic legal and judicial reform progress

Mr. Bun Honn, *President of the Bar Association of the Kingdom of Cambodia*

Mr. Bun Honn's focus was on the perspective of lawyers on current domestic legal and judicial reform.

He began by providing an overview of the legal profession in Cambodia. The profession commenced in 1932 and was developed into institutions to protect the rights of people to be represented. Unfortunately, due to historical political instability, the profession was weakened gradually into disappearance during the Khmer Rouge regime. The profession was gain official recognition again in 1979 after the fall of the regime, with around 10 lawyers remaining in the country. In 1995, the Bar Association of Kingdom of Cambodia was established with 30 lawyers, including lawyers surviving from the Khmer Rouge regime. According to the Law on the Bar (1995), the legal profession is an independent profession. That is, lawyers are not under the control of anyone or any institutions, and are free to accept or not accept a particular case. If they accept, they must work for their client honestly and to the best of their ability. The law also mentions dignity and cognizance in the implementation of this profession. To ensure this,

lawyers are subject to a statute, code of ethics and internal rule of the Bar.

Legal and judicial reform means the establishment of legal and judicial sector that can be trusted and that supports the principle of individual rights. It is important to build trust and confidence in the people who are seeking justice. This is one of the highest priorities of the government as the "do or die issue for Cambodia". The government has issued several strategies for reform of the legal and judicial sector, including:

- 1) the protection of rights and individual freedoms, such as the right to a fair trial, the right to reparations, and greater access justice for women;
- 2) modernization of the legal framework;
- 3) providing people with access to court information and laws;
- 4) the provision of quality legal proceedings and other related services;
- 5) strengthening the judicial services including the judiciary and prosecution which help improve the court monitoring;
- 6) including the alternative dispute resolutions
- 7) increasing the transfer of knowledge and expertise between judges, lawyers, experts, psychologists,

Lawyers are bound by several duties to their client. First, lawyers have a duty to defend their clients in a criminal case or to represent their client as a civil party. In the protection of rights and freedoms, lawyers must fulfill the duty to protect the rights and legitimate interests of their clients. When lawyers represent a client, they must do it honestly and independently, and ensure that what they are doing is in accordance with law and integrity. That is, if they accept a case, they must do it from the best of their ability and in accordance with law. Lawyers must put in good efforts and exhaust all legitimate legal means to properly defend or represent their clients, and do so ethically. Finally, lawyers have a duty to protect the poor and to provide legal assistance to people that otherwise cannot afford it. Unfortunately, there is little support from institutions in this regard. However the government is providing a budget of \$200 millions riel for legal aid schemes within the Bar Association. In addition, the Bar Association wants a national network to provide legal aid to poor people and is constantly seeking funding to achieve this purpose. It is vital to support legal representation for poor people across the country.

Another issue raised was about the dissemination of legal knowledge. It is necessary to ensure that people are aware of the existence of law and procedure. The Bar Association has established the Law Research, Education and Dissemination working-group for this purpose – lawyers now appear on TV and participate in outreach programs to explain law and procedures. This is an important contribution towards the rule of law, as many people do not understand the content or existence of laws and their updates. However, the Bar Association has since issued letters informing lawyers to ensure the quality of law dissemination and explanation. In fact, if dissemination is not done carefully, it may actually confuse the public and weaken the legal profession. It is essential that the lawyers themselves update their own legal knowledge, and ensure they are fully aware of the latest updates to the law (including those laws that are now obsolete) before disseminating this information to the public.

Lawyers also play an important role in providing consultation for the development of new draft laws. Lawyers need to be aware of what laws are in effect,

and those that have been amended or updated, to ensure that the law being disseminated upon will be to the highest standard. It is vital that lawyers are well-schooled on relevant aspects of the law, in order to create a strong profession. Local lawyers are competing with their foreign counterparts, which necessitates a strengthening of the capacity of domestic lawyers to ensure they provide a high quality service. If not, local lawyers will be weaker and will lose market share.

Mr. Bun Honn reiterated that in legal and judicial reform, it is important that lawyers operate to a very high standard, as this will allow them to appropriately defend their cases and clients. If not, people will lose trust and confidence in the legal profession. Therefore, the Bar Association is paying a lot of attention to capacity building, within both the national and international framework. With a stronger legal profession Cambodia can have more human resources in a variety of sectors that require legal consultation and advice. Lawyers from the ECCC have gained considerable experience to share with national lawyers and contribute to this capacity development.

OHCHR's mandate in domestic legal and judicial reform

Ms. Catherine Phuong, *Head of Rule of Law Unit, OHCHR-Cambodia*

Ms. Phuong began by outlining the main programs of OHCHR, being: rule of law program, prison reform and support, civil society and fundamental freedoms, land and housing rights and the annual report to the Human Rights Council.

Within the rule of law program, the OHCHR doesn't just work on legal and judicial reform. It is also involved with activities related to international human rights treaties (such as promoting ratification, assisting the government with their reporting obligations, publication of treaties in Khmer and trainings) and activities related to the implementation of human rights treaties, including through legal and judicial reform.

The OHCHR runs other of activities including:

- 1) Legal reform activities, including advocating



for new laws, providing comments on draft laws and advocating for the amendment of existing laws; and

- 2) Judicial reform activities, including advocating for change in behavior among actors in the criminal justice system, institution building and a focus on criminal procedure.

The main partners of OHCHR are the Ministry of Justice, the courts, prosecution offices, judicial police, the Bar Association, legal aid NGOs and other NGOs. OHCHR aims to work with the courts at all levels, including courts in the provinces. It also aims to both work with partners AND get them to work together with each other.

At the national level, OHCHR is responsible for organizing a series of conferences and workshops. This included the Conference on the implementation of the Code of Criminal Procedure (June 2012) and the production of a report that was endorsed by all participants. A workshop was also organized in September 2012 on improving cooperation between courts, prosecutors and prisons. The focus of that workshop was to get the different institutions to work together – in Cambodia; there are many challenges to get different actors in the criminal justice system to even talk to each other. OHCHR also organized a national workshop on the role of prosecutors in the criminal justice system.

The primary focus for OHCHR is on obtaining results from those meetings; that is, to get a report endorsed by all participants and clear and practical recommendations that can be followed up to ensure they are implemented.

One particular project that OHCHR was involved in was focused on improving the appeal process, particularly for long-standing appeals. This involved visiting prisons to determine which prisoners were awaiting an appeal. From that, priority cases were identified (for example, prisoners waiting for an appeal for over 5 years, juvenile cases, elderly prisoners, acquitted prisoners still in prison due to the prosecutor appealing). The next step was to work with the court of appeal to clarify the status of those cases (for example, some cases had already been decided but the judgment had never made it to the prisons). OHCHR also provided

support for the opening of a new court of appeal, which can share the workload and help address the backlog of cases. The goal is for appeal cases to be processed efficiently and done in accordance with proper procedure and fair trial principles.

OHCHR is now working with Ministry of Justice to improve some court forms, particularly regarding pre-trial detention. It also developed an Arrest Rights Card to give to arrested people (to make them aware of their rights) and has worked on a new code of ethics and professional conduct.

The issue then turns to how legacy fits into all of this. OHCHR has a specific legacy program that involves working with lawyers, law schools and civil society to ensure that the skills, knowledge and practices of the ECCC are transferred to the domestic sector and leave a positive impact in Cambodia (OHCHR has developed a Policy Tool on Hybrid Tribunals to assist with this). OHCHR also continues to organize various activities, including:

- 1) regular legacy update meetings, where stakeholders are invited to meet and update each other on their legacy activities/efforts;
- 2) the Fair Trial Rights Academy, a program for law students who are invited to a program where the implementation of trial rights are discussed, including guest speakers from the ECCC. Many law students study criminal procedure, but don't study the practice of how the laws are implemented. OHCHR has also put students in contact with members of the Bar Association to share their knowledge.
- 3) legal dialogues with the Bar Association.
- 4) judicial roundtables in the provinces, which involves a small group of lawyers, prosecutors and judges discussing various issues of criminal law with reference to ECCC procedure and practice. This shows legal professionals how the ECCC has relevance to their everyday work.

OHCHR aims to integrate legacy aspects in all of its activities on legal and judicial reform. This includes activities in the provinces, as OHCHR does not focus only on Phnom Penh. Its work involves talking with provincial judges, prosecutors and clerks to encourage

them to share information and experiences. OHCHR also visits police stations at the district level to distribute the Arrest Rights card.

There are, however, a number of challenges faced by OHCHR in promoting and implementing its legacy activities, including:

- 1) the legal and judicial sector suffers from a severe lack of resources. For example, many local courts don't have computers, and judicial police officers in some provinces don't have enough copies of the penal code to share;
- 2) national ownership is important. OHCHR's partners must actually want to do what OHCHR is asking them to do. That is, national actors must actually be committed to the activities that OHCHR want to run with them.
- 3) sustainability is also very important. We must ensure that the activities will continue long term after OHCHR involvement ends (for example) police-court meetings must continue even when OHCHR stops attending in the future).

Follow up and implementation is vital, especially at a time when budgets are cut and emphasis is on results.

Civil Society's perspective on the legal and judicial reform development

Mr. Sok Sam Oeun, *Executive Director of Cambodia Defenders Project (CDP)*

Mr. Sok Sam Oeun began by stating that there have been efforts in the past at improving the legal system, but there remains much room for improvement. The goal is to enable the national courts to function on their own and to the highest standards. Current problems lie with lack of resources – for example, many local courts lack computer equipment and rely on handwritten documents (or alternatively, have conservative judges who choose not to use computers). It may therefore be necessary to change some old behaviors and attitudes. The purpose of legacy is to incorporate good practices found in the ECCC into the domestic system. Cambodians simply don't have trust in the current system, and will often call upon the government (the executive, such as the Prime Minister) to help.

Therefore it is important to study both the national and ECCC systems to determine how the domestic system can be strengthened and improved.

A major flaw in the system is the practice of judges acting as prosecutors, thus blurring the lines between two roles (prosecution, judgment) that must remain distinct. For example, a prosecutor may drop charges for want of evidence, but the court still convicts the accused. The court therefore becomes a prosecuting institution, and weakening the role of the legitimate prosecutors. There still exists a lack of trust between the court and prosecutors; often the court won't trust or consider the prosecutor's documents and will find a way to convict even if the charges are dropped. This contributes to a skewed perception among the people of the court's true role – many see it as a prosecuting institution, which is not the proper role of the court. This is an abuse of power that must be addressed by legal and judicial reform.

Another factor leading to a lack of trust in the court system is actual and/or perceived corruption. If there is corruption in the system (such as via bribes), this must be addressed by judicial reform. If no action is taken, Cambodian people will lose trust in the legal system and will view the system as tainted by political interference and corruption.

Mr. Sok Sam Oeun proposed the following recommendations:

- 1) key principles of criminal law are to be reviewed;
- 2) the role and power of prosecutor and court should be made very clear. The power to dismiss a case should be upon the prosecutor, not the judge; and
- 3) the prosecutor and investigative judge system be reviewed. The court should not have the power to drop charges, change the charges or convict even where charges have been dropped. The court is there to judge on the evidence brought before it, not to play the role of prosecutor.
- 4) the fundamental laws, which are part of the legal and judicial reform commitment, must be adopted as soon as possible to ensure the independence of the judiciary.



Those fundamental laws include: (1) Law on amendment of the Supreme Council of Magistracy, (2) Law on the statute of judges and prosecutors; (3) Law on the organizing and functioning of the court and prosecution.

QUESTION AND ANSWER SESSION

A number of questions and comments were put forward by members of the audience that included the following:

- 1) regarding the limited capacity of the courts in the provinces, would like to ask whether we have any mechanism to send university graduates to conduct court research and assist the court and help build their capacity.
- 2) a major issue with detention is that the detainee will be apart from their family (may be head of the household) and the high expense involved in a long detention process. Overcrowded prison is a big problem and can lead to different kinds of violence. Alternative mechanisms of bail, judicial supervisions, suspensions (i.e. non-custodial measures) should be adopted, or at least considered.
- 3) I have read the OHCHR report – we can only be happy to have this kind of workshop, but the implementation is never complete at the domestic level. I don't want to hear about what we can do - just do it. Which institution or ministry has the power to undertake action? We engage in so much debate and discussion, but there is still a heavy focus on detaining in the domestic system. Perhaps we can give a recommendation to the justice minister – for lawyers we have a statute and code of ethics, but no legislative provisions exist for prosecutors and judges – they just do whatever they wish. This leads to lack of trust in the court system. Can we have a meeting that discusses the actual implementation of this recommendation?
- 4) What can we do to make our domestic court independent and to build trust and confidence? Have heard on radio and TV that about 80% of citizens don't have trust in the court. What can we do to make them independent? We have discussed this over and over again, but nothing is being done.
- 5) Want to ask OHCHR, according to your report, so far you have mentioned activities regarding legal and judicial reform. How much has actually been reformed and how much more needs to be done? In what year will Cambodia will have a proper rule of law - when will this actually happen?
- 6) How can we transfer the positive knowledge to get implementation started at the domestic court? What can we really do to implement? Lawyers talk alot, but no action taken.
- 7) Most Cambodians do not have confidence in the court s and in lawyers. Can Cambodian people use a foreign lawyer? What can we



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do to change people's perceptions to have confidence in the judicial system? How can we change a judge's behavior?

- 8) Do you think you can change the usual practices/local practices of the Cambodian judicial system?

Comments by Ms. Catherine Phuong

We have discussed before the use of students to assist the courts. Many courts would welcome extra help (for example, clerks to help process documents and do admin work). Courts need help not so much with research, but mainly with the admin/paper work, which takes a lot of time. Another challenge is finding students who are actually willing to go there and do some work. She said that she was happy to put universities in touch with provincial courts.

On the issue of alternatives to detention: this is a very topical issue within the Ministry of Justice. Two pilot projects are currently ongoing, which is designed to encourage judges to make decisions on alternative sentences (that is, other than detention). Another problem with pre-trial detention is that judges often do not provide reasons for imposing such detention. Usually they are required to fill out a simple form, rather than provide a proper judgment with reasons. We have brought in people from the ECCC to show local judges how the ECCC makes decisions, and the reasoning provided. We need to move away from the simple form-filling approach.

Regarding the previous recommendations, the Minister of Justice has endorsed the report containing the recommendations. OHCHR can now go back and work on the implementation of those recommendations.

Ms. Phuong stated that she cannot answer the question on when rule of law will be implemented in Cambodia or how far (in terms of percentage) that it has come. There should be no deadline – we should always strive to improve the rule of law. Even in France the rule of law is not perfect.

Comments by Mr. Bun Honn

The Ministry of Justice is responsible for making and monitoring laws. Can we put pressures on the court to implement measures? What we have found out is that giving recommendations is a positive step in legal and judicial reform, and then putting those recommendations forward to the judicial institutions and bodies. But can we really estimate or assess the effectiveness of how our recommendations are implemented? There must have been some changes through our recommendations, although we don't have specific figures or research proving that. We should not be too pessimistic in terms of this endeavor. I believe there is some progress, although it may not be tangible. We can see in this country that more laws are being adapted and updated. Increasing human resources and other resources is vital to improve institutions. Working to strengthen capacity is



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important. We should not be pessimistic – compared to the past we have made a lot of progress.

Regarding the question of how ECCC practices can be implemented at the domestic level, we are here today to discuss this issue – workshops are designed to work out how positive legacy can be implemented at the domestic level. I believe that we have achieved a lot in terms of the objectives.

Comments by Mr. Sok Sam Oeun

Regarding the courts' independence, we need to have political will. The most important institution in this regard is the Supreme Council of the Magistracy (SCM). The King as the chairperson of the SCM has a large role to ensure independence, but he needs some power to do so.

Judges must be subjected to a code of ethics, and we need the power to punish judges who commit wrongful acts. Legal and judicial reform is also important. Sometimes the system is good, but the people are the problem. Providing a record of documents is also important - if the ECCC were closed down tomorrow, who is responsible for compiling and copying relevant documents and information? These documents are vital for knowledge and future reform. We need to be ready and consider this issue.

Another point is the judges' capacity. I have had a meeting with the school for judicial professionals and various experts, and they are very open to assist in any way possible. Also, there is no incentive for writers to do proper academic publications and report on the ECCC jurisprudence.

He reiterated that if we wanted to improve our quality, the law students, for example, must understand English, as legal documents in Khmer are very limited at this stage.

Comments by Mr. Bun Honn

Regarding Question 7, we cannot force a client to use a particular lawyer. Clients have the right to use any lawyer they want, whether national or foreign. But foreign lawyers don't have legitimate status to work in Cambodia yet (not referring to lawyers in ECCC, as they are officially registered). There are some foreign lawyers who are not yet registered.

Will Cambodian lawyers have limited jobs in the future? We are working on strategies to improve the capacity of national lawyers so they can be more competitive. We need to ensure that lawyers adhere to international standards and have the appropriate skills and knowledge.

Comments by Mr. Sok Sam Oeun

If the Court is clean and not corrupt, then a lawyer would have an incentive to study law seriously. But if the court is corrupt, what is the need to study the law/documents seriously? This doesn't mean that the lawyer is weak or uneducated, but a weak court will lead to a weak lawyer. If the court is strong, then the lawyer will be strong. Brokers can get 50% of the fee – why study law when you can be a broker and get 50% of the fee?

Comments by Ms. Catherine Phuong

In terms of whether we can change the norms and practices of Cambodian judges, we have to remain positive and believe that we can do it. There are people who are committed to legal and judicial reform, and they are hopeful of making changes. Our work is to provide them with support to do those changes. It is important to keep that belief. Lack of written judgments is a major concern, and this is an issue that we are working on. We also need to address the issue of accountability between the different actors in the criminal justice system. For example, we have more chance to encourage judges to actually write proper judgments if the lawyers, prisons and prosecutors demand it. The more they are asked to do it, then the greater chance they will do it.

The point was made that where the courts are strong, the lawyers are strong. But the lawyers must be strong first, as they have a very important role in pushing for changes. If they make the right arguments (as at the ECCC), then they can prompt the judges to make the right decisions. If the lawyers don't make the arguments, then the judges will not respond accordingly.

To come back on the issue of legacy – this is an extremely important aspect of rule of law work. Having a hybrid tribunal just outside of town is an incredible opportunity for the Cambodian people to improve their knowledge of criminal justice and procedure.

IV. PANEL DISCUSSION III: KEY ASPECTS OF LEGACIES OF THE ECCC FOR DOMESTIC LEGAL AND JUDICIAL REFORM

This session was moderated by **Mr. Latt Ky**, KRT Program Coordinator of ADHOC



Left to right: Dr. Lao Mong Hay, Mr. So Mosseny, Mr. Latt Ky, Mr. Lor Chunthy and Dr. Meas Bora (Photo by: Chantha)

Analytical Perspective from a Civil Party Lawyer at the ECCC

Mr. Lor Chunthy, Civil Party Lawyer at the ECCC/
Lawyer at Legal Aid of Cambodia (LAC)

Mr. Lor Chunthy began by discussing the issue of legacy, within the context of national and international laws. At the national level there are three courts. At the international level, we have international criminal court or international criminal tribunals which are governed by their statutes. In Cambodia, we have the ECCC which is governed by the laws of the establishment of the ECCC and the internal rules. It is important to look at the context of national law first, and where there are no provisions to resolve a particular conflict, then international law can step in. According to him, there are some important aspects of legacy of the ECCC to be learnt for the national court as follows:

Equality of arms

Another point to be observed is that the various parties in a criminal case must be able to stand on an equal footing (for example, with respect to time provided, documents exchanged etc). It is only fair that all

parties are given equal opportunities. This principle is strictly applied at the ECCC although there were some times, some parties are likely have less chance to present their arguments in the court room.

Legal database management

Legal database is used to help fasten the proceedings. All the parties are allowed to use legal database including the judges and prosecutors. The database contains all legal documents, evidences, facts and other necessary documents which can be used by the parties. It is set up by computer software. For example, we can now see that the court of appeal has adopted this system so that it will be easier to locate data or information. Documents such as submissions and expert analysis should be incorporated into a technological system for ease of reference.

Reasoning decisions

The fact that the ECCC is different from national court is that it provides reasoned decisions on particular legal issues that are referenced to the facts, law and legal arguments. All the parties need to do so, and the judicial officials maintain a high standard of these reasoned formats. An example is the judgment



delivered by the ECCC with regard to the *Duch* case which included detailed reasons for their conclusions. This can be applied to our national court's practices. On the other observation, at the ECCC, judges can have dissenting opinion on legal issues, which is good to know what and why other judges have different opinions and decisions on certain things.

However, the Civil Party lawyer noted that there are some difficulties in practice, especially the common representation of a large group of civil parties in Case 002. Also, the legal aid lawyers and their court appointed counterpart have different resources available to them, and this has an impact on their ability to deal with cases and clients they are representing. For instance, legal aid lawyers with its little funding from their respective organizations' donors could not often meet with their clients who are living far from the city, whereas court-funded lawyers could have better access.

Analytical Perspective from a Defense Lawyer at the ECCC

Mr. So Mosseny, *Lawyer and Case Manager in Defense Support Section of the ECCC*

Mr. So Mosseny provided a perspective on the legacy issue from a defense lawyer's perspective. The ECCC is a national court operating under Cambodian law, with guidance from international law. ECCC jurisprudence can be used as guidance in domestic cases. Such jurisprudence is crucial for local lawyers and will assist them to work on cases from a different perspective, and can shape the view of judges by encouraging them to see things from another point of view.

We should not be afraid to admit that we lack certain skills and knowledge to reach our full potential as lawyers and should learn from the ECCC.

A major issue is the advancement of a client's fair trial rights. The Cambodian constitution provides a basis for fair trial principles by incorporating international human rights instruments. Fair trial principles include the right to a fair hearing, presumption of innocence, right to representation and the right to be tried in the accused's presence. These principles are rarely translated to practice. Local courts generally don't

provide for such rights, and when raised by lawyers, the issue has not been decided upon with proper reasoning.

Fair trial rights are invoked from the moment a person is arrested. Rights should extend to both named and unnamed suspects in detention. Defense lawyers must consider certain issues, such as the grounds upon which an accused should be provisionally released (such as humanitarian or health reasons). Another issue raised by defense lawyers is how the evidence is to be tested at trial, and the admissibility of such evidence. Defense lawyers are also concerned about the impartiality and independence of the judges, and have called for judges to be disqualified for lack of impartiality.

Pushing for an open and transparent process is also an essential aspect of the work done by a defense lawyer. The process should be in public if possible, and corruption should not be tolerated. Demanding open transparency also encourages the court to be more accountable for their decisions.

Good preparation is the key to success for a defense team. The lawyer should spend considerable time preparing for the case and take part in judicial investigation by filing relevant requests.

To conclude, Mr. So Mosseny recommended that the record, filings and judicial decisions be accessible to all lawyers. The Bar Association in cooperation with ECCC should create a taskforce to identify the key filings to be made accessible. Such practices should be included in training for the schools for lawyers and judges, or be topics for ongoing legal education.

Analytical Perspective from the Civil Society

Dr. Lao Mong Hay, *Independent Expert*

Dr. Lao Mong Hay was involved in the early stages of the establishment of the ECCC. He stated that when deciding whether to establish the ECCC, it was hoped that the principle of law could be incorporated into the Cambodian criminal procedural code and other laws. The ultimate goal was to establish a court system that could find truth and justice for everyone.

Dr. Mong Hay observed that there are national and

international NGOs helping the country after the war. However, they seemed to beat around the bush in terms of legacy implementation – there is much talk but no action. When we talk about legal and judicial reform, we are talking about the establishment of the system, not just reform. Our constitution, which is 20 years old, requires the establishment of independent courts by law. This constitutional provision has been violated since 1993 as the domestic court is not independent and not yet established by law. In addition, we still don't have laws governing the behavior of judges and prosecutors, yet we have a statute and ethical code for lawyers (1995), the military (1999) and parliamentarians.

He emphasized that the ECCC is a law school, a historical school where many people can learn from it. It does not only archive legal documents but also the history of the Khmer Rouge regime. The ECCC is also a joint civilizing mission to deliver international standard of justice. In summary, according to Dr. Lao Mong Hay there are several best practices at the ECCC which can be learnt from to make better at the national judiciary.

Court room setting and the right to equality before the court of law

The courtroom setting itself at the national court needs to be reformed so that it has the same or similar design as the ECCC courtroom, that is: (i) the prosecution/civil party lawyers, defense and court clerk are positioned

at the same level, with the court clerk desk right in front and underneath the judges; (ii) the dock and witness box should be situated in the middle and facing the judges; and (iii) there be provided seating for members of the public and the press.

Inmate conviction versus guilt beyond reasonable doubt

Dr. Lao mentioned that the need that judge to have its decision on case before it must be beyond reasonable doubt. He said according the Cambodian Constitution clearly stated that "in case of any doubt, it shall be resolved in favor of the accused."

Fair trial rights and presumption of innocence principle

The presumption of innocence principle must be strictly applied in all case. This case was debated at the ECCC and the defense lawyers have played critical role in making arguments during the stage of proceedings. Fair trial rights must be ensured for the interest of all the parties, particularly the civil party and accused before the court of law which must be created under the law and independent and impartial in functioning.

In conclusion, he suggested creating an *ad hoc* organization with a view to collate all elements of the procedures of the Khmer Rouge tribunal, including all principles it has adopted, with a view to incorporating them into the Cambodian Criminal Procedure Code.



Workshop participants



He also said that experts can be assisted in making comparison of those best practices and principles applied at the ECCC and the current standing of the procedures applied at the national courts.

Analytical Perspective from the Academic Institution

Dr. Meas Bora, *Lawyer and Vice-Rector of the Cambodian University of Specialties (CUS)*

Dr. Meas Bora commented that there needed to be more participation by the academic sector on the issue of legacy apart from the CSOs, the government and the court itself. His presentation was focused on the contribution of universities within the context of the legacy project. There are many definitions and interpretations of the meaning of “legacy,” however Dr. Bora wanted to talk mainly about the transfer of knowledge through the ECCC and how a law school can contribute to this.

Dr. Meas Bora made four points with respect to the situation of academic institutions on criminal justice system:

- 1) lack of knowledge of judicial reform within academic institutions. Only people in NGOs or people involved in the sector seem to be aware of the issues surrounding legal and judicial reform;

- 2) lack of courses and degrees. Only two universities providing a relevant MA in human rights. There is also a lack of interest in, or culture of, reading and writing relating to this subject;
- 3) lack of research and publications on criminal justice. What exists now is very superficial and does not deal comprehensively with the ECCC; and
- 4) limited incentives for students and professors to become involved in ECCC internships and training.

In order to remedy this, we need the involvement and participation of all relevant stakeholders and institutions, including academic institutions. We also need to take the opportunity to learn from the ECCC before its proceedings end. Accordingly, we need adequate resources to assist with ECCC legacy work. Finally, the legacy should focus on jurisprudence, and provide realistic recommendations to make implementation feasible.

With respect to the contribution of law schools, it is necessary to have the cooperation of various academic institutions, who may also provide places to organize workshops. Academic libraries also need to be better resourced; including easy access to ECCC resources (perhaps require a dedicated ECCC shelf in the library).



Workshop participants

Finally, law student internships should be provided at courts in remote areas, and a system of incentives set up to encourage this.

QUESTION AND ANSWER SESSION

A number of questions and comments were put forward by members of the audience which included the following:

- 1) When can Cambodia implement this legacy initiative? What about improving conditions in the detention centers?
- 2) Dr. Lao said that the accused is to be tried by an independent court, but we don't have a court established by law. Does this mean that our court is an illegal court?
- 3) Today we talked about implementation of the legacy – what are the positive legacies from the ECCC? Do we just list down and then start to implement?
- 4) The ECCC uses both national and international law. Can we use a hybrid civil/common law system in our domestic courts?

Comments by Dr. Lao Mong Hay

We find in principle that an accused has the right not to be detained and the right to be released on bail. A judge sometimes will detain them to force them to pay for a civil case, but this is unconstitutional. We need more focus on the option of releasing on bail. It is better to release 10 people who are guilty than detain an innocent person.

Regarding the positive legacy, in my experience, it is not enough to just monitor the court. What we do before the trial has a bigger influence than at the trial stage. We need to focus on better procedures

and detention conditions. What are the rights of the accused? What are the rights of people found guilty? It is not clear. A procedure that is more specific, detailed and clear is better. If someone does not follow the procedure, then they need to be punished (disciplinary or administrative punishment).

Comments by Mr. So Mosseny

When we established the ECCC we understood that our Cambodian judicial system was not good enough and therefore wanted to use this international hybrid tribunal in order to urge for better reform.

Regarding pre-trial detention, the law of the ECCC says that the detention must comply with international law. We must ensure that lawyers fight for their clients' rights. Before, max pre-trial detention was 3 years but now it is up to 6-7 years. As defense lawyers, we have proposed changes to detention conditions (for example, putting an accused in hospital for treatment, rather than detention facilities).

Comments by Mr. Lor Chunthy

The ECCC uses both civil and common law systems, but is predominantly a civil law system. During the investigation, the national procedural code is used, and if anything is contradicting this code, then the international provisions can jump in. All parties are to be equal, including prosecutors. At the domestic level, it seems that prosecutors are superior in terms of power. At the ECCC, all judicial parties are equal.

Comments by Dr. Meas Bora

Sometimes legacy is an abstract concept and difficult to see, and it needs an inclusive approach etc. It takes time. In order to achieve success, we need collaboration from all relevant stakeholders.



V. REFLECTION AND INTERACTIVE DISCUSSION ON THE FEASIBLE BEST PRACTICES OF THE ECCC AND THEIR IMPLEMENTATION

This session was jointly moderated **Mr. Long Panhavuth**, Program Officer of Cambodian Justice Initiative and **Mr. Oeung Jeudy**, CHRAC Program Officer.



Left to right: Mr. Long Panhavuth and Mr. Oeung Jeudy (Photo by: Chantha)

In reflecting on today's workshop, Mr. Long Panhavuth argued that now is the right time to learn from the ECCC whilst the court is still ongoing.

He also made the following summary observations before allowing the opinions expressed by the workshop participants:

- a) Three key points of legacy are: (i) transfer of knowledge to promote the rule of law; (ii) fair trial rights; and (iii) proper treatment of victims and the detained.
- b) The prosecution and defense teams should have an appropriate budget and resources, and that each party has equal time to present their arguments.
- c) A comprehensive database system is also very important so that a particular side knows, for example, how many witnesses are testifying against them.
- d) Archive management and documentation are useful and they are important for legal legacy of the court. It also need further study and research at the domestic level.
- e) Transparency is very important because it helps the public's understanding of what

is going on at the courts and the right to information of the public can also ensure that the courts are working in a professional, independent and impartial manner.

- f) Trial monitors are allowed to document ECCC proceedings with their computers brought into the court premise, whereas domestic courts usually don't allow the trial monitors to use computers and rely on crude handwritten notes. The monitoring itself can be useful for applying at the national court to help ensure transparency and fairness of the trial proceedings.

Interactive Discussion on the best practices which can be transferred to the domestic legal and judicial reform:

This section aimed at reflecting the comments made by all the speakers presented during the day and further ideas contributed by the participants. Mr. Oeung Jeudy summarized the comments and suggestions made by the participants during the interactive discussion with regard to the ECCC's best practices which can be applied by the lawyers in their professional works at the national judiciary.

(1) ECCC Jurisprudences or ECCC Cases Law

There was significant debate about the usefulness of the ECCC jurisprudences for the national courts; particularly if the cases are similar. In fact at the national court, the decisions of the higher courts, for example the Supreme Court, might be cited as jurisprudences for the same or similar cases at the lower courts. However, currently, this is not the usual practice by prosecutors and judges at the domestic court. There are of course many jurisprudences that can be learnt from the ECCC, including but not limited to, *fair trial rights*, *presumption of innocence*, *pre-trial detention*, *the use of amicus curia brief*, *equality of arms*, *dissent opinions by trial judges*...etc.

Recommendations:

- ◆ We need to check whether the amendment of some Articles in the Cambodian Criminal Procedure Code is needed in order to allow for ECCC jurisprudences to be used or made as references in the domestic court cases. This can be deeply researched by a legal expert or consultant since the ECCC proceeding combined both civil law and common law principles, and whereas Cambodia is applying civil law traditions.
- ◆ We need further research on the ECCC jurisprudences on certain legal issues for example, the principle of fair trial rights, presumption of innocence, provisional detention (application of non-custodial measures); etc.
- ◆ We should encourage legal professionals such as lawyers to start using the provisions of international human rights covenants as recognized by the Cambodian Constitution (*Article 31*) and reaffirmed by the Constitutional Council (*Decision No. 092/003/2007, 10 July 2007*) for cases at the national court. This international human rights provision such as the *International Covenant on Civil and Political Rights (ICCPR)*, articles that relevant to the court proceedings.

(2) Case management

At the ECCC, a legal database and Casemap software is used by the judicial officials including lawyers. They can all access the case files through a proper case management tool. Having a legal

database will then help the lawyers to prepare their cases better, more effective and faster.

Recommendation

- ◆ The need to establish a simple and efficient case management system for the domestic courts, especially to use the Khmer language so that it would help the judicial officials (judges and prosecutors) and lawyers to work on the case faster and more effectively.

(3) Case preparation

As mentioned by Mr. So Mosseny, a case manager for Ieng Sary's defense team at the ECCC, there is a need for lawyer to prepare his or her case well. In order to do so effectively and successfully the lawyer needs tools such as case management, and including a "*defense theory*" that must be developed by the lawyer for the case he or she represents. If we look at the ECCC cases, those are so complicated, but lawyers must be well prepared including their defense techniques, evidence screening, witness examination, and use all legal and procedural means to ensure that the case is well prepared prior to the trial and during the trial.

Recommendation:

- ◆ Organizing peers to peers trainings or sharing sessions among Cambodian lawyers practicing at the ECCC and lawyers practicing at the domestic courts.
- ◆ The Bar Association can organize thematic workshops or roundtables on these topics with the assistance of the ECCC practicing lawyers;

(4) Active case defense and representation (legal advocacy)

The strengths of the activities of the defense counsels at the ECCC have been recognized, when compared with the practice at the national court. This activism should be transferred to the practice at the national court by defense counsel and civil party lawyers in representing their clients. Some examples are the writing of submissions, motions on particular legal and procedural issues seriously as well as challenging the evidences concerning the cases.

Recommendation:

- Lessons learnt on the writing of motions and submissions should be shared by the ECCC practicing lawyers to their fellows practicing at the national courts;

(5) Open and transparent trial proceedings

Despite some criticisms of non-disclosure and non-transparency of certain procedural issues, especially in regard to the judicial investigation, following the principle of *confidential judicial investigation* most of judicial information in regard to the cases before the ECCC has been disclosed by the Co-Investigating Judges and the Co-prosecutors at some procedural stages. Except some procedural matters, which allowed by the internal rules by *in camera hearing*, much of the trial proceedings have been made in public, and open to the public and the media. Court schedules are made available for the public to attend the hearing and observe the trials.

Recommendations:

- Advocacy must be initiated by lawyers and human rights NGOs with the national court to follow the procedures at the ECCC which enable for a more open and transparent trial proceedings;
- Encouraging trial monitors to report the non-disclosure and thereby increase transparency of the proceedings;

(6) Practical court room set up (equality of the parties)

The courtroom set up at the ECCC should be classified a model court which should be designed for all national courts throughout the country. The design which shows the equality of the parties (prosecutor, defense and civil party) with the clear set up of the trial judge bench is necessary to ensure the principle of equality of arms. The judges, prosecutors and lawyers of the defense and civil parties at the ECCC can be a role model for the national court and their experiences should then be applied best at the national court practice.

Recommendations:

- Ministry of Justice shall discuss with the ECCC Administration Office to use the ECCC court room set up for the national court (room

set up);

- Encouraging judges, prosecutors, lawyers and other legal officials working at the ECCC to act the same (both behaviors and commitment) or share their work experiences with their fellows at the domestic courts;

How we implement the best practices (ECCC) legacy and recommendations:

In response to how we can, as a professional institution or an NGO or an individual, implement the above-mentioned best practices and recommendations, the workshop participants suggested the following measures:

- a) Creating legal internship programs, legal debates, legal journals at universities, CSOs and the Bar association;
- b) Organizing more discussions, meetings and workshops and create concrete action plan on specific aspect of legacies and apply them;
- c) Cambodian lawyer should be required to do a certain amount of pro bono before they can become qualified as a full member. This will enable them to become involved in the reform process;
- d) Strong lawyers will result in a strong court and vice versa. Need to build capacity of the lawyers within the court system. Need greater courage and activism;
- e) Building capacity of the lawyers to act in the court including professional courage and activism;
- f) Engaging with the press on the transparency and opening of the proceedings;
- g) Needing funding, commitment and expertise in order to implement the legacy recommendations;
- h) The Bar Association can make official requests to the Ministry of Justice and the courts to ensure equality of arms and opening and transparency of the proceedings;
- i) Comments and recommendations of the workshop should be sent directly to the responsible institutions such as the Ministry of Justice, the Legal and Judicial Reform Council, the national courts at all levels and the Bar Association.

VI. WRAP UP OF THE WORKSHOP AND CLOSING REMARKS



Left to right: Mr. Suon Bunsak and Mr. Marc Spitzkatz at the closing session (Photo by: Chantha)

Wrap up of the workshop

Mr. Marc Spitzkatz, *Director of Rule of Law Program Asia, KAS Singapore*

In the last session, Mr. Spitzkatz expressed positive view on the outcomes of this workshop. The KAS Rule of Law Program Director highlighted that each actor involved in this workshop is an important element to make the best practices at the ECCC implementable. Of course, the government is the one who makes policies on the reform of the legal system and the judiciary; however, if we don't have a strong regulatory body, lawyers and the civil society, the reform cannot be easily achieved. Mr. Spitzkatz said that this workshop not only provided a number of the significant best practices of the ECCC for the lawyers but also provided a venue where these legal professionals and civil society workers can interact, discuss and exchange their experiences related to their daily works at the courts, and eventually look for ways to contribute to the legal and judicial reform process. Mr. Spitzkatz finally concluded that on the path to successful reform will need the efforts and commitment from all relevant actors, namely the lawyers and the civil society organizations. In the end, he thanked once again to the BAKC and CHRAC, especially their staff members who were so active, for making this event happen and fruitfully completed.

Closing Remarks

Mr. Suon Bunsak, *Executive Secretary of CHRAC*

As a co-organizer and in the name of CHRAC Mr. Suon Bunsak expressed sincere thanks to the BAKC for co-hosting this important workshop. The CHRAC Executive Secretary also took this opportunity to sincerely appreciate all the participants who provided inputs and actively participated in the workshop, which ultimately made this workshop to complete successfully. He reminded that it is important that the lawyers both working at the ECCC for the defense and for the civil party sections should share their extensive experiences with their colleagues practicing at the domestic judiciary. This workshop was just the first session for the lawyers to meet, but he also said that the Bar Association would be able to initiate more forums for these best practices to be shared widely. On the part of CHRAC, he said optimistically that he would be very happy to co-organize these kinds of workshops or more debate with the Bar Association and any other actors as it wanted to contribute in the process of legal and judicial reform in Cambodia. We knew that the legal and judicial reform at the domestic courts, especially, the adoption of the fundamental laws relevant to the courts, needed political will and time, so therefore we need to continue working together to do lobbying and advocacy with the government's relevant ministries and institutions. Lastly, Mr. Suon Bunsak further hoped that this workshop did not just create these outcomes, but also help the CSOs to initiate more projects and action plans in regard to the legal and judicial reform within their program agenda.





ANNEX: WORKSHOP AGENDA

Workshop Agenda on “Implementation of the ECCC Legacies for Domestic Legal and Judicial Reform”

Co-organized by: CHRAC and (BAKC)

Funded by: Konrad Adenauer Stiftung (KAS) Singapore | On 12 March 2013 at Sunway Hotel, Phnom Penh

Time	Topic/presentation	Facilitator/speaker
7.45- 8.15	Registration of participants	MC (Mr. Hun SeangHak, CHRAC Project Officer)
8.15-8.25	Welcome remark	Mr. Thun Saray, CHRAC Representative/ ADHOC President
8.25-8.35	Keynotes	Mr. Marc Spitzkatz, Director of Rule of Law Program Asia, Konrad Adenauer Stiftung Singapore
8.35-8.45	Opening remark	Mr. Bun Honn, President of the Bar Association of the Kingdom of Cambodia
8.45- 9.45	Panel Discussion I: An Overview of ECCC's Legacies	facilitated by: Mr. Pich Ang, National lead co-lawyer of civil parties at the ECCC
8.45-9.00	<ul style="list-style-type: none"> Presentation of ECCC Legacies Conference's Results (key recommendations) pertaining legal and judicial aspects 	Mr. Simon Meseinberg, CIM advisor at ECCC Trial Chamber
9.00-9.15	<ul style="list-style-type: none"> ECCC's Legacy for the Rule of Law in Cambodia 	Ms. Jennifer Holligan, Researcher of the KAS-Singapore University of Management Project
9.15-9.30	<ul style="list-style-type: none"> The Contribution of ECCC Proceedings to Cambodian Law 	Dr. David Boyle Researcher and former legal officer at the ECCC's Office of Co-Investigating Judges
9.30-10.10	Q & A session	MC
10.10-10.30	Coffee break	MC
10.30-12.00	Panel Discussion II: Current legal and judicial reform efforts	facilitated by: Mr. Sam Sokong, Civil Party Lawyer & Lawyer of Legal Aid of Cambodia (LAC)
10.30-10.50	<ul style="list-style-type: none"> Perspective of legal professional on the current domestic legal and judicial reform progress 	Mr. Bun Honn, President of the Bar Association of the Kingdom of Cambodia
10.50-11.10	<ul style="list-style-type: none"> OHCHR's mandate in domestic legal and judicial reform 	Ms. Catherine Phuong, Head of Rule of Law Unit, OHCHR- Cambodia
11.10-11.00	<ul style="list-style-type: none"> Civil Society's perspective on the Legal and judicial reform development 	Mr. Sok Sam Oeun, Executive Director of CDP
11.30-12.00	Q & A session	MC
12.00-13.30	Lunch break	MC

13.30-14.50	Panel Discussion III: Key Aspects of Legacies of the ECCC for Domestic Legal and Judicial Reform: <ul style="list-style-type: none"> Analytical Perspective from a Civil Party Lawyer at the ECCC (15 mins) Analytical Perspective from a Defense Lawyer at the ECCC (15 mins) Analytical Perspective from the Civil Society (15 mins) Analytical Perspective from the Academic Institution (15 mins) Q & A Session (20 mins)	facilitated by: Mr. Latt Ky , Program Coordinator of ADHOC Mr. Lor Chunthy , Civil Party lawyer at the ECCC/ Lawyer of LAC Mr. So Mosseny , Lawyer & Case Manager in Defense Support Section of the ECCC Dr. Lao Mong Hay , Independent Expert Dr. Meas Bora , Lawyer and Vice-Rector of Cambodia University of Specialties (CUS)
14.50-15.40	Interactive Discussion & Recommendations based on the overall perspectives shared by all panelists <ol style="list-style-type: none"> What specific “<i>best practices/ legacies of the ECCC</i>” can be applied at the national justice system What aspects of Cambodian laws should be amended if any with the best practices at the ECCC What should be the roles of the participants to influence the legal and judicial reform process? [With presence of all panelists/ speakers and with the participants]	facilitated by: Mr. Long Panhavuth Program Officer of Cambodian Justice Initiative (CJI)
15.40-16.00	<i>Coffee break</i>	<i>MC</i>
16.00-16.30	Presentation of the results from the Interactive Discussions Session	jointly facilitated by: Mr. Long Panhavuth and Mr. Oeung Jeudy (CHRAAC’s Program Officer)
16.30-17.00	Wrap up of the key results of the workshop and Closing remarks	Mr. Marc Spitzkatz , Director of Rule of Law Program, KAS Singapore Mr. Suon Bunsak , Executive Secretary of CHRAAC

Co-Organized by:

The Cambodian Human Rights Action Committee
(CHRAC) and the Bar Association of the
Kingdom of Cambodia **(BAKC)**



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